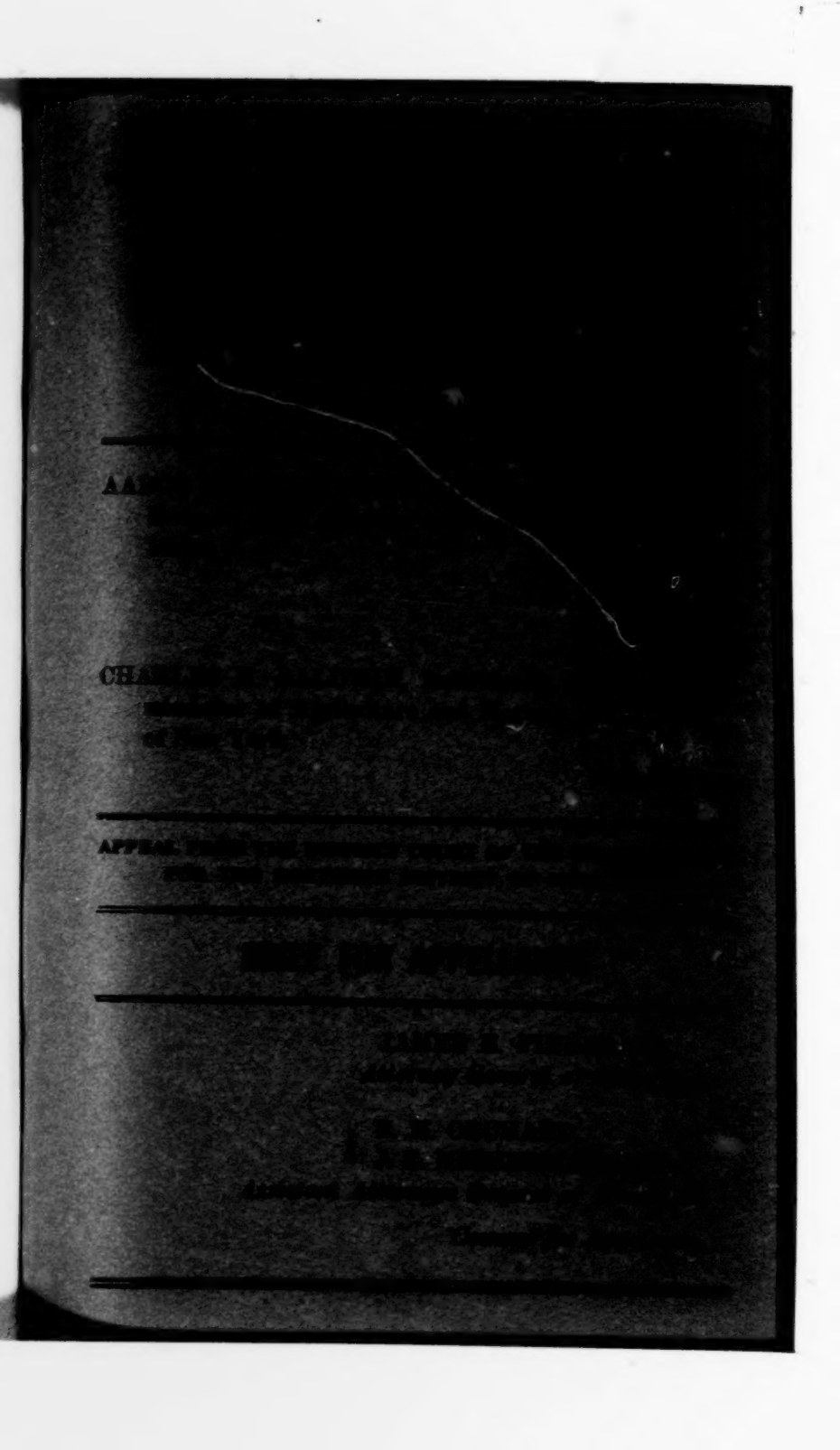

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 760

AARON MINTZ and LOUIS MINTZ, Copartners, doing business under the firm name and style of Mintz & Mintz,

Appellants,

v.

CHARLES H. BALDWIN, Individually and as Commissioner of Agriculture and Markets of the State of New York,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

NATURE OF SUIT

This is an appeal from the District Court of the United States for the Northern District of New York, denying the motion for a preliminary injunction and dismissing the bill of complaint asking for a perpetual injunction and vacating the temporary restraining order granted to the appellee against the Commissioner of Agriculture and Markets of the State of New York and individually, from

enforcing an order made by said commissioner, which by its terms required all bovine animals coming into New York to be subject to the requirement that all cattle over six months of age, imported for dairy and breeding purposes, shall come directly from herds certified to be free from Bang's disease by the chief live stock sanitary official by whatever name known of the country, province or state of origin.

The application was made in the District Court of the United States for the Northern District of New York. The Honorable Frank Cooper, the acting District Judge, granted a preliminary restraining order and the case was heard in the month of February, 1933, at the city of Albany before the Honorable Augustus N. Hand, Circuit Judge, Frank Cooper and Frederick H. Bryant, District Judges, under sec. 266 of the Judicial Code (act of March 3, 1911, c. 231, 36 Stats., 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

The answer of the appellee did not put in issue any of the material facts of the complaint and no testimony was taken but affidavits were filed showing the nature of Bang's disease as being a highly contagious and infectious cattle disease prevalent in various parts of the country.

RESULT

The decision of the statutory court was in favor of the appellee, the temporary restraining order was vacated and the complaint dismissed.

STATEMENT OF FACTS

This is a civil suit in equity, arising under the constitution and laws of the United States, and brought by citizens and residents of Wisconsin against the Commissioner of Agriculture and Markets of the state of New York. (R.

3, 4.) Appellants, copartners in trade, doing business under the firm name of Mintz and Mintz, in the state of Wisconsin, New Jersey and other states, are engaged in the breeding and in the sale and transportation in interstate commerce of cattle for dairy and breeding purposes. (R. 3.) Their cattle are purchased or bred and are located in Wisconsin, whence they ship annually to buyers in New York upwards of a thousand head of cattle. (R. 6, 7.) At great expense, appellants have built up and developed in the state of New York, among buyers of cattle for dairy and breeding purposes, a valuable trade and good will which exceeds three thousand dollars ($3,000) in value, and which will be completely destroyed by appellee's enforcement of his said order. (R. 3.)

Appellee, as Commissioner of Agriculture and Markets of the state of New York, with his principal office at Albany, in the Northern District of New York, is chief executive officer of the New York Department of Agriculture and Markets; he is charged with the duty of providing generally for the exercise of the powers and the performance of the duties of said department; and to that end he is authorized to enact, amend and repeal necessary rules. (R. 4.)

Under date of August 29, 1932, defendant, purporting to act as such Commissioner and in pursuance of sections 72 and 74 of the Agriculture and Markets Law of the State of New York (R. 4-8), promulgated, published and posted an order, effective October 1, 1932, and designated in the bill of complaint and in this brief as said order, a copy whereof, marked "A," is annexed to and made a part of the bill of complaint. (R. 4, 13-14.) By its terms, all bovine animals coming into New York are subjected to the following requirements (R. 13):

> "All cattle over six months of age imported for dairy or breeding purposes shall come directly from

herds certified to be free from Bang's disease by the chief livestock sanitary official by whatever name known of the country, province or state of origin. Such animals at the time of import must be accompanied by a certificate authenticated by such livestock sanitary official showing the name and address of the laboratory or person making the last blood test on such herd with a complete statement of the results of such test on the animals so imported. Such certificate shall describe each animal in such manner as to enable its identification by ear tag number, name and registration number in the case of pure breds and ear tag number in the case of grades. Such certificate shall include or be accompanied by the certificate above mentioned as to freedom of the herd from Bang's disease. A duplicate of such authenticated certificate or certificates must be filed with the Department of Agriculture and Markets, Albany, N. Y., by the consignee at the time the shipment is received, unless such duplicate has previously been filed by the consignor."

On or about October 21, 1932, appellants shipped from Appleton, Wisconsin, to one Edgar Bartlett, at Sharon Station, New York, twenty head of grade cattle for dairy and breeding purposes, all over six months of age, which, at the time of their arrival at Sharon Station were accompanied by a certificate authenticated by the chief live stock sanitary official of Wisconsin, showing the name and address of the laboratory or person making the last blood test on those twenty head of cattle, with a complete statement that the results of such test showed each of said animals to be free from Bang's disease. Such certificate described each of those twenty head of cattle in such manner as to enable its identification by ear tag and a duplicate of such certificate was filed by appellant with the New York Department of Agriculture and Markets, at its office in Albany, on or about October 23, 1932. (R. 9.)

Because said certificate neither included nor was accompanied by any certificate that the herd from which those twenty head of cattle came was free from Bang's disease, appellee, upon the arrival of the twenty head of cattle at Sharon Station, New York, and before delivery thereof to Edgar Bartlett, their consignee, issued, on October 26, 1932, what he denominated a "Quarantine Order," a copy whereof, marked "B," is annexed to and made a part of the bill of complaint. (R. 9-10, 14-15.) Appellee's issuance of such quarantine order prevented appellants from delivering any of those twenty head of cattle to their consignor, and compelled appellants, at great pecuniary loss, to reship all of the cattle from Sharon Station and to transport them to a point outside New York. (R. 9.)

Continued enforcement of appellee's said order of August 29, 1932, which he threatens and proposes, will completely destroy, with consequent irreparable loss and damage to appellants, their business of selling and transporting dairy and breeding cattle from Wisconsin to New York, the value of appellants' right to conduct their business, without such interference by appellee therewith, being greatly in excess of three thousand dollars ($3,000). (R. 10.)

Appellants' business, the success of which consists in supplying their customers with cattle for dairy and breeding purposes in such numbers and at such times as their customers' necessities may require, has already been injuriously affected by appellee's said order, since it has stopped the sale and transportation of appellants' cattle from Wisconsin into New York, has resulted in a loss to appellants of orders for cattle from appellants' customers in New York, has compelled appellants to cancel their acceptance of such orders, and has prevented appellants from filling orders which they have received from customers in New York for several carloads of cattle to be shipped from

Wisconsin to New York for dairy and breeding purposes; all of which has worked and will continue to work immediate and irreparable injury, loss and damage to appellants, the value of whose right to conduct their business, without such interference by appellee therewith, greatly exceeds three thousand dollars ($3,000). (R. 10-11, 16.)

Should appellee, as appellants are informed and believe that he threatens and proposes, subject to inspection, examination and quarantine, after their interstate transportation into New York shall have been completed, healthy bovine animals for the sole reason that such animals are not accompanied by a certificate authenticated by the chief live stock sanitary official at Wisconsin that such animals have come directly from a herd free from Bang's disease, appellants' business of selling and transporting dairy and breeding cattle from Wisconsin to New York will be completely destroyed, with consequent irreparable loss and damage to appellants, to whom the value of their right to conduct their business, without such interference by appellee therewith, greatly exceeds three thousand dollars ($3,000).

If appellants, in disregard of appellee's said order, continue to sell and transport their cattle for dairy and breeding purposes from Wisconsin into New York, they will be subject to a multiplicity of prosecutions and suits for the collection of the penalties prescribed in sections 40 and 41 of the Agriculture and Markets Law of the state of New York, fully set forth in paragraph 9 of the bill of complaint. (R. 7-8.)

By an act entitled "An Act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes," passed February 2, 1903 (21 United States Code Annotated, sections 120, 121 and 122, and amended by the act of Congress passed February 7,

1928, 1932 Cumulative Annual Pocket Part, page 14), Congress has authorized and directed the Secretary of Agriculture to establish such rules and regulations concerning the transportation of live stock from any place within the United States where he may have reason to believe dangerous, contagious, infectious or communicable diseases among such live stock may exist, into and through any state or territory as he may deem necessary, and has provided that whenever any inspector of the Bureau of Animal Industry shall issue a certificate showing such officer had inspected any cattle or live stock, which were about to be driven or transported from any such locality into another, as above set forth, and had found them free from infectious, contagious, or communicable disease, the animals so inspected and certified may be shipped, driven or transported from any such place into and through any state or territory without further inspection. (R. 7-8.)

By an act, entitled "An Act to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes," passed March 3, 1905 (21 United States Code Annotated, Sections 123, 124, 125 and 126, and amended by the act of Congress passed February 7, 1928, 1932 Cumulative Annual Pocket Parts, pages 14-15), Congress has authorized and directed the Secretary of Agriculture to quarantine any state or territory, or portion thereof, when he shall determine the fact that cattle or other live stock in such state or territory are affected with any contagious, infectious, or communicable disease, and when the public safety will permit, make rules and regulations permitting and governing the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment from any quarantined state or territory into another state or territory. (R. 8-9.)

Appellants contend that Congress, by enacting the two acts hereinbefore last set forth, has assumed control of the entire field of transportation and quarantine of live stock which is the subject of commerce between the states, in so far as action to prevent or lessen the spread of dangerous, contagious, infectious or communicable diseases is concerned, and such control by Congress excludes from that field any action by the several states with respect thereto, by reason whereof said order is null and void, in that it contravenes the provisions of the commerce clause of the Constitution of the United States. (R. 8-9.)

Appellants' further contention that appellee's said order, in that it is directed against the importation into the state of New York, from other states, of healthy cattle, unless such healthy cattle be certified as prescribed in said order to come directly from herds free from Bang's disease, deprives appellants of their property in contravention of the due process clause of the Fourteenth Amendment, is not pressed, since research made since the preparation of the bill of complaint has satisfied counsel that it is untenable.

ASSIGNMENTS OF ERROR WHICH ARE ALSO STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

The learned District Court erred in deciding, holding and adjudging:

I.

That appellee's order, a copy whereof marked "A" is annexed to and made a part of the bill of complaint herein, was issued consistently with the provisions of Sections 72 and 74 of the Agriculture and Markets Law of the State of New York.

II.

That said order is directed to a field of regulation which has not been fully covered by federal legislation, and in which the federal government has not attempted to supersede the police power of the States.

III.

That said order, so far as appears in this suit, is not in conflict with any federal legislation.

IV.

That said order does not discriminate against owners of cattle outside New York State, and is not a direct burden upon interstate commerce.

V.

That no reason appears for holding that said order to be otherwise than valid and constitutional.

VI.

That the bill of complaint herein should be dismissed.

VII.

And the learned District Court erred in dismissing the bill of complaint herein.

(R. 98.)

ARGUMENT

I.

THE STATUTORY JURISDICTIONAL AMOUNT IS INVOLVED.

It is sufficient for the bill of complaint to allege, as here (R. 10-11), that the value to appellants of their right to conduct their business, free from appellee's interference, exceeds $3,000.

Bitterman v. Louisville & Nashville R. R., 207 U. S. 205, 225;
Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U. S. 121, 126;
Packard v. Banton, 264 U. S. 140, 142;
Board of Trade of City of Chicago v. Cella Com. Co., 145 Fed. 28, 29;
Mutual Oil Co. v. Zehrung et al., 11 F. (2d) 887, 889;
Gen. Petroleum Corp. of California v. Beamblossom, 47 F. (2d) 826, 828.

Jurisdiction is to be determined by the allegations of the bill, and not by the way the facts turn out or by a decision of the merits.

Mosher v. City of Phoenix, U. S. Sup. Ct., Nov. 7, 1932;
South Covington & Cincinnati Street Ry. Co. v. Newport, 259 U. S. 97.

Appellants are not required to wait until their damages reach the jurisdictional amount.

Scott v. Donald, 165 U. S. 107, 115;
Board of Trade of City of Chicago v. Cella Com. Co., 145 Fed. 28, 29 (approved in *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322, 336).

II.

APPELLEE'S ORDER CONTRAVENES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION (art 1, sec. 8, par. 3).

a. Congress has already occupied the field.

Direct authority in accord is *Must Hatch Incubator Co. v. Patterson*, 27 F. (2d) 447, decided by a statutory court of three judges in May, 1928. That case involved the right of Oregon and Washington to prohibit, by board or department regulations, the importation of baby chicks into those states unless the chicks were accompanied by an official health certificate, as prescribed in the state regulations. Because the acts of Congress approved, respectively, February 2, 1903, and March 3, 1905, upon which appellants rely in the case at bar, did not then expressly include live poultry within their provisions, earlier suits brought by the same appellant for similar relief had been dismissed in July, 1927, by a statutory court of three judges whose opinion was not reported until long afterwards (32 F. (2d) 714). But, following an amendment of those acts, by act of Congress approved February 7, 1928, so as specifically to include live poultry within their provisions, appellants renewed their suits in which the opinion first above cited was rendered on May 14, 1928. It was there distinctly held that, by the acts of 1903 and 1905, Congress had occupied the entire field of both inspection and quarantine, to the exclusion of any state action thereon. In reaching that decision the court felt that it was not concluded by all that was said by the Supreme Court in *Asbell v. Kansas*, 209 U. S. 251, hereinafter discussed, in view of later decisions by the Supreme Court in the following cases, which will be considered further along in this brief:

Oregon-Washington R. R. & Navigation Co. v. Washington, 270 U. S. 87;
Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605;
Mo. Pac. R. R. Co. v. Porter, 273 U. S. 341.

To a better understanding of the Supreme Court's decisions relating to state inspection and quarantine where transportation in interstate commerce has been involved, the cases should be taken up in their order.

Reid v. Colorado, 187 U. S. 137, presented the question whether the animal industry act of May 29, 1884, covered the whole subject of interstate transportation of live stock. The Supreme Court held that it did not, but "left a wide field for the exercise by the states of their power" (p. 147), and stressed the co-operative provisions of section 3 of the act for concerted action by the federal government and the states in furtherance of the objects of the act (pp. 143, 147). Elsewhere, the Supreme Court has regarded the co-operative provisions of that act as indicating an intention on the part of Congress not to occupy the whole field.

M. K. & T. Ry. Co. v. Haber, 169 U. S. 613, 623;
Oregon-Washington R. R. & Navigation Co. v. Washington, 270 U. S. 87, 100.

Ashbell v. Kansas, 209 U. S. 251 arose after the enactment of the Acts of 1903 and 1905 (p. 257), and, limiting its decision solely to the act of 1903, the Supreme Court held that there was no conflict between it and the Kansas statute under review, since the latter, in express terms, admitted to Kansas cattle inspected and certified by an inspector of the Federal Bureau of Animal Industry, as prescribed by section 1 of the act of 1903 (21 U. S. Code, section 121). Accordingly, the Supreme Court sustained the

conviction of one who, contrary to the state law, had brought cattle into Kansas without any inspection whatever, state or federal, a circumstance emphasized near the close of the opinion in *Must Hatch Incubator Co. v. Patterson*, 27 F. (2d) 447, 449.

In *Ashbell v. Kansas*, 209 U. S. 251, on page 257, it is said:

> "* * * Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the Act of February 2, 1903, [21 U. S. Cod., Sec. 120, 121 and 122] and the Act of March 3, 1905 [21 U. S. C. A., Sec. 123, 125, and 126]. The provisions of these acts need not be fully stated. The only part of them which seems relevant to this case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected * * * infectious, contagious, or communicable disease, 'such animals so inspected and certified may be shipped, driven, or transported * * * into * * * any State or Territory * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.' There can be no doubt that this is the supreme law, and if the state law conflicts with it, the state law must yield. * * *"

In said case it thus appears that the United States has exercised its power to regulate the interstate movement of cattle which are liable to be afflicted with dangerous, infectious, contagious and communicable diseases and has assumed control of the whole field so far as legislation is concerned.

Oregon-Washington R. R. & Navigation Co. v. Washington, 270 U. S. 87, sometimes called the "alfalfa case,"

brought up for review an injunction which the state of Washington had obtained, restraining the railroad from bringing into the state alfalfa except in sealed containers, as prescribed by an order promulgated by the state authorities, because of the existence of the alfalfa weevil in certain neighboring states. The railroad successfully invoked, as paramount and exclusive, the plant quarantine act of August 20, 1912 (7 U. S. Code, chapter 8), especially section 8 thereof, quoted in full in the opinion (R. 97-99), empowering the Secretary of Agriculture to quarantine any area "when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation." The court said on page 102:

> "It follows that pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the Federal statute. The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, state action is illegal and unwarranted."

The doctrine of the alfalfa case is completely in harmony with the principle which ruled the following cases, where acts of Congress in relation to interstate carriers were held to supersede state legislation on the same subject:

Safety Appliances:

Southern Ry. Co. v. R. R. Comm. of Indiana, 236 U. S. 439, 446-7.

On page 446 quoting from *Prigg v. Commonwealth of Pennsylvania*, 41 U. S. (16 Pet.) 539, 617, it is said:

"'If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it . . . the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed.'"

Hours of Service:

No. Pac. Ry. Co. v. State of Washington ex rel. Atkinson, 222 U. S. 370, 378-9.

On page 378-379 the court said:

"* * * It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have

been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute."

Supremacy of the federal statute over a state statute is also clearly stated in the case where the liability to employees for non-negligent injuries was concerned:

N. Y. C. R. R. Co. v. Winfield, 244 U. S. 147, 149, 153;

also on the subject of locomotive equipment:

Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605, 612-613;

and concerning bills of lading:

Mo. Pac. R. R. Co. v. Porter, 273 U. S. 341, 345-346.

In the case of *Mo. Pac. R. R. Co. v. Porter,* 273 U. S. 341, this court, speaking through Justice Butler, said on page 345-346:

"* * * Congress must be deemed to have determined that the rule laid down and the means provided

to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction. * * *"

The last two cases cited were relied upon by the statutory court in the case of the *Must Hatch Incubator Co. v. Patterson*, 27 F. (2d) 447, 449.

That the quarantine provisions of the act of 1905 nullify state action on the subject was held by the Kansas City Court of Appeals of Missouri in *State v. Ch. M. & St. P. R. R.*, 206 S. W. 419, where the railroad had been convicted of a violation of a state quarantine order promulgated in the absence of any action by the Secretary of Agriculture on the subject. Said the court of the federal act of 1905 (pp. 421-422):

"In the present instance the federal statute, under the authority of the Constitution of the United States, supplants that of the state.

"But it is insisted by the state that until the Secretary of Agriculture acts under the authority given him by Congress, and declares quarantine against the state of Iowa, the superior authority of Congress could not be considered to have been asserted, and hence the state had authority to declare quarantine against cattle in Iowa, and prescribe rules and regulations against bringing cattle into this state from that state.

"We think that is a mistaken view of what Congress did and intended. When Congress, by the act above referred to, 'directed' the Secretary of Agriculture to declare quarantine against any state or part of a state whenever, on investigation, he believed the cattle in such state or part thereof was affected with

any contagious disease, and required him to prescribe rules and regulations in all interstate shipments for the transportation of cattle, it assumed control of the subject.

"By such statute Congress affirmatively and exclusively occupied the field of quarantine as it related to interstate shipments of cattle. It directed the Secretary of Agriculture to ascertain when quarantine was necessary, and we must assume that, when that official had not quarantined any particular section or district of country, no cause of quarantine existed, and hence any declaration of quarantine by state officers under the state statute was usurping the authority of Congress, and was a void act as it related to an interstate shipment. The state concedes, as of course it must, that if Congress had acted in regard to quarantine and interstate shipments it would have superseded the state law; but the error into which the state has fallen is in assuming that Congress had not acted. Congress asserted its authority by putting the matter of quarantine exclusively in the hands of the Secretary of Agriculture, the effect of which was to take such matter out of the hands of state officials acting under a superseded state law. If, as insisted time and again by the state, no federal law was in force until the event of the Secretary of Agriculture declaring quarantine, what would be said of a situation where the Secretary did not consider there was cause for quarantine, and therefore took no action, and the state thought there was? What sort of medley would this opposite action and clash of authority present?"

b. The order burdens interstate commerce.

It is directed against the importation of animals certified to be healthy, unless they also be certified to have come directly from a herd free from Bang's disease. (R. 9, 13.) But it is not a legitimate exercise of its reserved police power for a state to exclude cattle from importation "without any distinction between such as may be diseased

and such as are not"; *i.e.*, "no matter whether they are free from disease or not."

Railroad Co. v. Husen, 95 U. S. 465, 469, 473.

That such was the point upon which the decision turned in the case last cited, the Supreme Court has taken occasion to indicate.

Asbell v. Kansas, 209 U. S. 251, 256.

A Minnesota statute in part entitled "An act for the protection of the public health," which prescribed that animals intended for human food must be inspected in that state before being slaughtered, was held void because, in its practical operation, it excluded from the markets of Minnesota all meat, even if entirely sound and healthy, as shown by inspection in the state of origin, and thus worked a discrimination against the products and business of other states in favor of those of Minnesota.

Minnesota v. Barber, 136 U. S. 313, 322-323.

The same conclusion was reached with respect to a Virginia statute which required all meat sold within the state to be first approved by local inspectors, except in the case of animals which had been slaughtered within one hundred miles from the place of sale.

Brimmer v. Rebman, 138 U. S. 78, 82-3.

At the same term of the Supreme Court a like decision was rendered in respect to a Virginia statute, which provided for state inspection of all flour brought into the state for sale.

Voight v. Wright, 141 U. S. 62, 66-67.

Appellants, in the case at bar, submit that appellee's order is so plainly discriminatory in favor of New York cattle men, to the prejudice of cattle men in other states, as to suggest at once the question whether such is not really its latent purpose, however artfully it may be clothed in the guise of a public-health measure.

c. Appellants' right to federal protection extends beyond the completion of their cattle's journey in interstate commerce.

This extends to the quarantine threatened by the appellee.

Brown v. Maryland, 25 U. S. (12 Wheat.) 419, 447.

On page 447 it is said:

"* * * To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. * * *"

See also

Bowman v. Chicago &c. Ry. Co., 125 U. S. 465, 504-5;
Swift & Co. v. United States, 196 U. S. 375, 398-9;
Welton v. Missouri, 91 U. S. 275, 282.

Of the commerce power of Congress, this court, in the case of *Machine Co. v. Gage*, 10 Otto 676, 678, has said:

"* * * This power applies to articles taken from one State into another, until they become mingled with

and a part of the property of the latter, and thereafter protects such articles from any burden imposed by reason of their foreign origin."

See also

New York Trust Co. v. Eisner, 256 U. S. 345, 348;
Sonneborn Bros. v. Keeling, 262 U. S. 506, 516.

III.

CONSIDERATIONS OF PUBLIC HEALTH ARE NOT INVOLVED.

This point is addressed to the contention in appellee's affidavit, used on his motion before Judge Cooper, on November 14, 1932, to vacate the temporary restraining order, that Bang's disease is the cause of undulant fever in human beings. To that contention the answer is threefold:

1. The argument should be addressed, not to this Court, but to the Secretary of Agriculture, who has been clothed by Congress with paramount and exclusive authority in the premises.

2. In New York the responsibility for preservation of the public health is placed by statute, not on the Commissioner of Agriculture and Markets under any provision of the Agriculture and Markets Law, but upon the Department of Health, the head of which is the Commissioner of Health who, together with six other members appointed by the Governor, constitutes the Public Health Council.

Public Health Law, sections 2 and 2-a.

The Public Health Council is empowered to establish sanitary regulations, called The Sanitary Code, which "may deal with any matters affecting the security of life

or health or the preservation and improvement of public health in the state of New York."

Public Health Law, section 2-b.

The Sanitary Code thus established by the Public Health Council, while it includes undulant fever among the diseases classified as infectious, contagious or communicable, makes no provision whatever for a quarantine of cattle infected with Bang's disease. Therefore, if and when the Public Health Council shall conclude that prevention of undulant fever calls for such a measure as the order which appellee has taken it upon himself to make, it is fair to assume that the Public Health Council will act accordingly. Until that time, however, it is not for appellee, purporting to act under the Agriculture and Markets Law, to arrogate to himself the functions of the Public Health Council.

Furthermore, the Commissioner of Health is vested with plenary power to inspect, regulate and supervise the sanitary quality of milk and cream distributed, consumed, or sold within the state, whether produced within or without the State.

Public Health Law, section 6-b.

3. Appellee, having asserted in his order that he is promulgating it in pursuance of the authority conferred upon him by sections 72 and 74 of the Agriculture and Markets Law (R. 13, 14), cannot now be heard to attempt to brace it up as a public health measure.

IV.

STATUTES OF 1903 AND 1905 ARE OF GENERAL OPERATION AND APPLY TO THIS CASE.

Three cases are cited to show the contrary in the opinion of the court and argument of counsel:

Atchison, etc. Railway Co. v. Railroad Comm., 283 U. S. 380, 391-393;
Savage v. Jones, 225 U. S. 501, 533;
Missouri, etc. Railway v. Haber, 169 U. S. 613, 625.

This argument is clearly shown fallacious by Justice Cooper in his dissenting opinion on pp. 80-82 of the Record. The case of *United States v. Johnson*, 35 Fed. (2d) 256 is also claimed to support the same contention. Justice Cooper has also clearly shown in his opinion that this is not the case and that if it should seem to warrant such an inference it is out of harmony with *Thornton v. United States*, 271 U. S. 414. (R. 83.) The federal statute here in question clearly covers the whole field for the Commissioner of Agriculture is not only authorized but directed to act in all cases when he may have reason to believe disease exists, in the act of 1903, and when he shall determine the fact that cattle are afflicted with disease as given in the act of 1905. Of course he should not act when there is no contagious disease, but he has a mandate to act when he has exercised his discretion and found that the contagious disease does exist. He is not to abuse his discretion however. It is not optional with him to act or not to act. He is directed to act when he finds and believes that the disease exists.

Justice Cooper also shows in his dissenting opinion that the statutes of New York recognizes the federal inspection and certificate of the individual animal and receives such animal as lawfully imported; but that the Oc-

tober order of the Commissioner of Agriculture and Markets excludes and ignores the federal inspection and certificate entirely, whether the Secretary of Agriculture has acted or not acted, and excludes all animals which are not certified by the chief live stock sanitary official of the state of origin, to be disease-free and to have come from a disease-free herd. This order is therefore clearly in conflict with section 74 of the New York state Agriculture and Markets law. While the question whether or not an order of a state officer transcends his statutory authority although ordinarily a state and not a federal question, still when the order invades the exclusive field of federal authority, it is then a federal question.

V.

THE OCTOBER ORDER DISCRIMINATES IN FAVOR OF NEW YORK CATTLE DEALERS AND AGAINST ALL OTHERS.

While there is inspection provided by state law for New York state cattle, there is no requirement in such inspection that to be sold in the state they shall come from a herd all the members of which are free from Bang's disease. The October order requires this of imported cattle but not of domestic cattle. We refer to Justice Cooper's dissenting opinion and the authorities cited on pages 87-88 of the Record, and we quote the following conclusion as our own from Justice Cooper's opinion:

> "The October order, then, is an invasion of the field of Interstate commerce already fully covered by the Federal law, prescribes requirements greater than the Secretary of Agriculture could make, were he to act under the Federal law, and is invalid; it is not an exercise of the State police power by the State legislature in whom alone that power resides, but it is an

illegal and unauthorized attempt to exercise that power by an executive officer in conflict with and in violation of the very statute under which alone he has power to make regulations; it is a discrimination against citizens of all other states in favor of Citizens of New York and is a burden upon interstate commerce." (R. 89.)

We submit that the ruling of the trial court should be reversed and an order made for the granting of the perpetual injunction.

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